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OKP (CNMI) Corporation

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN MARIANA ISLANDS

DONGBU INSURANCE
COMPANY, LTD.,

Plaintiff,

vs.

OKP (CNMI) CORPORATION,
and JOAQUIN Q. ATALIG,

Defendants.

CIVIL ACTION NO. CV 08-0002

MOTION FOR PARTIAL SUMMARY
JUDGMENT; MEMORANDUM OF
POINTS AND AUTHORITIES;
STATEMENT OF UNDISPUTED FACTS;
EXHIBITS 1-29; DECLARATIONS OF
SEAN E. FRINK AND BRIAN M. CHEN

DATE: July 10, 2008

TIME: 1:30 p.m.


JUDGE: Hon. Alex R. Munson

Comes now Defendant OKP (CNMI) Corporation and moves the Court for an order on its Counterclaim for Declaratory Judgment. Specifically, OKP seeks an order from the Court finding that Dongbu had and continues to have a duty to defend OKP in the underlying Atalig lawsuit.

This Motion is supported by the attached Memorandum of Points and Authorities, the attached Statement of Undisputed Facts, the exhibits, declarations, the pleadings filed herein and such additional evidence and documents as may be presented at argument on this motion.

CARLSMITH BALL LLP

DATED: Saipan, MP, May 22, 2008.



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1 I. **BACKGROUND AND SUMMARY OF ARGUMENT**

2 A. **Background**

3
4 OKP (CNMI), Corporation ("OKP") brings this Motion For Summary Judgment seeking
5 a determination that Dongbu Insurance Company, Ltd. ("Dongbu") had and has a duty to defend
6 OKP in the pending CNMI Superior Court lawsuit entitled *Atalig v. OKP, et al*, Civil Action No.
7 06-119R.

8 On October 28, 2005 OKP entered into a contract with Commonwealth Ports Authority
9 for a construction project in Rota known as the Rota International Airport Runway and Extension
10 Project. (OKP Undisputed Fact No. 10) ("OKP U.F."). In connection with that project OKP
11 secured the two subject policies of insurance from Dongbu through Dongbu's General Agent,
12 Moylan's Insurance Underwriters, Inc. ("Moylans") (OKP U.F. 10). The two policies are:
13 Automobile Policy KMA-0912-00) for the period of cover December 15, 2005 to December 14,
14 2006, and Contractors All Risk Policy KMCR0015-500, for the period of cover January 16, 2006
15 to January 17, 2007, subject to coverage beginning upon commencement of work or unloading of
16 items insured, notwithstanding the specific coverage date shown in the policy. These policies are
17 binding contracts between the parties wherein OKP is the insured and Dongbu is the insurer
18 (OKP U.F. 1-7).

19 As part of the overall construction project on or about November 2, 2005, OKP leased
20 from Joaquin Atalig ("Atalig") a portion of this property located in Sinapalo, Rota to be used as a
21 staging area for the project. (Atalig/OKP Lease, Exhibit 10 and 12).¹

22 On March 23, 2006 Atalig filed his original Complaint in CNMI Superior Court alleging
23 various causes of action against OKP and others for violation of the terms of the lease between
24 OKP and Atalig. (Exhibit 14, original Complaint in Civil Action No. 06-0119R.) On March 24,
25 2006 newspaper articles appeared in both the Marianas Variety and the Saipan Tribune which
26 reported the lawsuit. (Exhibit 2 and 3). Within approximately a week of March 24, 2006, Brian

27
28 ¹ In the underlying suit OKP questions the validity of the lease attached and referred to in the Atalig Complaints. Notwithstanding same, for purposes of this motion, the lease is identified as the operative document.

1 Chen, General Manager of OKP had a conversation with Cecilia A. Anas of Moylan's, the person
2 responsible for OKP's policies and bonds at Moylan's and Ms. Anas acknowledged she had seen
3 the newspaper article(s) and was aware of the lawsuit. (Brian Chen Declaration). Thereafter,
4 until the later part of July, 2006 counsel for OKP filed several motions to strike portions of the
5 original Complaint and to dismiss certain causes of actions (OKP U.F. 17, 18, 20, and 21).
6 During this period of time OKP did not have any contact from Dongbu regarding the lawsuit and
7 to OKP's knowledge Dongbu did not undertake any investigation of the Atalig claims. (Chen
8 Declaration). Also during this time period counsel for OKP successfully defended against a
9 Motion for Summary Judgment filed by Atalig. (OKP U.F. 19 and 21).

10 On July 31, 2006, Atalig filed a First Amended Complaint and on August 9, 2006 (Frink
11 Declaration) Brian Chen delivered a copy of the First Amended Complaint to Cecilia A. Anas of
12 Moylan's and asked that Dongbu defend and indemnify OKP. (Chen Declaration); this
13 constitutes a tender of defense of the claims in the First Amended Complaint. On September 6,
14 2006 OKP wrote Dongbu to follow up on the tender of defense (see Exhibit 4, Chen Declaration)
15 and on September 27, 2006 counsel for OKP wrote to Dongbu's authorized agent (Moylan's) to
16 likewise follow up on the tender of defense (Exhibit 5, Chen Declaration). It was not until
17 March 5, 2007 that Dongbu stated its position and by letter of that date counsel for Dongbu
18 responded to counsel for OKP advising Dongbu believed there was no coverage under the
19 Dongbu policies. (Exhibit 10). On April 18, 2007 Atalig filed his Second Amended Complaint
20 (Exhibit 11) and on May 3, 2007, a copy of the Second Amended Complaint was delivered to
21 Dongbu's counsel (Frink Declaration).

22 On July 12, 2007 counsel for OKP responded to the March 7, 2007 letter from Dongbu
23 and again demanded Dongbu undertake defense of the Atalig lawsuit. (Exhibit 17). Dongbu,
24 through counsel, responded on October 12, 2007 (Exhibit 18), again declining to defend the
25 Atalig lawsuit.

26 Dongbu's ultimate response was to refuse to defend and after almost 18 months filed this
27 declaration judgment action on March 3, 2008. In due course OKP filed its answer and
28 counterclaim against Dongbu seeking declaratory judgment of Dongbu's obligations under its

1 policies issued to OKP.

2 OKP contends it has properly notified Dongbu of the Atalig suit, has properly tendered
3 defense of that action and that Dongbu wrongfully refuses to defend or indemnify OKP from the
4 Atalig claims.

5 **B. Summary of Argument**

6 OKP purchased the subject two policies of insurance from Dongbu with the expectation
7 that such policies would provide coverage for claims which might potentially arise in connection
8 with the Rota International Airport Project. Suit has been filed in the CNMI Superior Court by
9 Joaquin Atalig for a variety of claims, some of which would be covered by the policies and some
10 of which may not.

11 Dongbu received notification of the suit and defense has been tendered. Despite
12 notification and tender of the defense of the suit and a demand that Dongbu fulfill its duty to
13 defend, Dongbu refused and continues to refuse to defend.

14 Dongbu's refusal is unjustified and in contravention of its obligations under the policies.
15 The claims in the underlying action were "caused by accident" as that term is to be applied under
16 the Auto Policy and the claims are an "accidental loss" as the term is used in the CAR Policy.
17 OKP's position is that the plain meaning of these terms requires Dongbu to defend. However, if
18 it were to be determined these terms are ambiguous, then Dongbu would still be required to
19 defend as any ambiguity is to be resolved against the insurer as drafter of the policy.

20 When the allegations of the underlying Complaint are compared to the Dongbu policies
21 and consideration is given to extrinsic facts/evidence that were available or readily ascertainable
22 to Dongbu had it undertaken any investigation of the facts related to the Atalig Complaint, the
23 underlying claims in the Atalig suit come within coverage of the Dongbu policies.

24 Dongbu by its prolonged inaction after knowledge of the suit and tender of defense has
25 waived any right to forfeit coverage based on any alleged deficiency in notification. Under the
26 circumstances, because of Dongbu's failure to act it is completely appropriate that OKP
27 undertake the defense of the Atalig lawsuit.
28

1 OKP is entitled to a determination that there are no genuine issues of material fact as it
2 relates to the duty to defend and the court is requested to determine as a matter of law that
3 Dongbu is required to assume the defense of the Atalig suit.

4 In the event the Court determines there is a duty to defend, OKP by separate application
5 will request the Court to determine that Dongbu be required to reimburse OKP for its attorney
6 fees and expenses incurred by reason of Dongbu's failure to defend the Atalig lawsuit and being
7 compelled to pursue this counterclaim.

8 II. STANDARD OF REVIEW

9 Under Federal Rule of Civil Procedure 56(c), a court should grant summary judgment
10 when, viewing the evidence in the light most favorable to the nonmoving party, the "pleadings,
11 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
12 any, show that there is no genuine issue as to any material fact and that the moving party is
13 entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); see *Celotex Corp. v. Catrett*, 477
14 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). "When
15 a motion for summary judgment is made and supported as provided in this rule, an adverse party
16 may not rest upon the mere allegations or denials of the adverse party's pleadings, but the
17 adverse party's response, by affidavits or as otherwise provided in this rule, must set forth
18 specific facts showing that there is a genuine issue for trial. If the adverse party does not so
19 respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R.
20 Civ. Pro. 56(e). However, it is not necessary for the party moving for summary judgment to
21 introduce evidence that negates the plaintiff's claim. *Celotex*, 477 U.S. 258, 323. Instead, the
22 moving party may show in its motion that there is no evidence to support an essential element of
23 the non-moving party's claim. *Id.* at 325.

24 According to the Ninth Circuit, in order to withstand a motion for summary judgment, a
25 party: (1) must make a showing sufficient to establish a genuine issue of fact with respect to any
26 element for which it bears the burden of proof; (2) must show that there is an issue that may
27 reasonably be resolved in favor of either party; and (3) must come forward with more persuasive
28

Casualty Co., 74 Cal. Rptr. 3d 657, 662 (2008):

1. Insurer owes a duty to defend when the claim presents any potential for indemnity;
2. Determine duty to defend by comparing the terms of the policy with the allegations of the Complaint and any known extrinsic facts;
3. Any doubt as to duty to defend is resolved in favor of the insured;
4. To afford the insured the greatest possible protection, policy provisions are interpreted broadly, and exclusionary clauses are interpreted narrowly against the insurer;

A CNMI case that considered the question of ambiguity in an insurance policy is *Ito vs. Macro Energy, Inc.* 4 N.M.I. 46, 68 (1993) which says:

A policy will be enforced according to its terms by reading it as a whole. (citations omitted.) The exception to this rule is where there is an ambiguity, in which case the ambiguous term is interpreted in favor of coverage. (citation omitted) (emphasis supplied)

B. Duty to indemnify

OKP would acknowledge that it would be premature for the court to address the issue of duty to indemnify; duty to indemnify is more appropriately considered after further resolution of the underlying Atalig suit.

Notwithstanding it being too early to determine duty to indemnify, the court can and should decide the issue of duty to defend.

V. THE DONGBU POLICIES²

A. The Automobile Policy

On December 27, 2005 Dongbu issued to OKP Policy No. 150230-150230 (KMA-09102-500), the Automobile Policy for the coverage period December 15, 2005 to December 15, 2006. A copy of the Automobile Policy is attached hereto marked as Exhibit 6. The policy provides coverage as follows: Coverage A Bodily Injury Liability \$1,000,000 each

² For purpose of this motion only, the Auto Policy and CAR Policy attached as Exhibits should be considered as the applicable policies. This qualification is made because OKP has repeatedly requested complete copies of the policies from Dongbu which have yet to be provided.

1 person/\$2,000,000 each accident; Coverage B Property Damage Liability \$3,000,000.

2 B. **The Contractor's All Risk Policy (CAR Policy)**

3
4 On January 19, 2006 Dongbu issued to OKP Policy No. KMCR0015-500, for the period
5 of January 16, 2006 to January 16, 2007 subject to the Period of Cover which states in part:

6 **"PERIOD OF COVER:** The liability of the Insurers shall
7 commence, notwithstanding any date to the contrary specified in
8 the Schedule, directly upon commencement of work or after the
9 unloading of the items entered in the Schedule at the site. The
10 Insurer's liability expires for parts of the insured contract works
11 taken over or put into service. At the latest the insurance shall
12 expire on the date specified in the Schedule. Any extensions of the
13 period of insurance are subject to the prior written consent of the
14 Insurers."

15 The policy identifies the site as Rota, Commonwealth of the Northern Marianas. The
16 equipment arrived on Rota on December 20, 2005 and work began between December 20-22,
17 2005 (Chen Declaration).

18 C. **The Insuring Agreements Of The Automobile Policy And The Car Policy**

19 1. **The Automobile Policy**

20 As it relates to the property damage claims made against OKP in the *Atalig v. OKP*
21 lawsuit pending in the Commonwealth Superior Court, the **INSURING AGREEMENT** states:

22 **Coverage B. Property Damage Liability:** To indemnify the
23 insured for all sums which he shall become legally obligated to pay
24 as damages because of injury to or destruction of property,
25 including the loss of use thereof, caused by accident and arising
26 out of ownership, maintenance or use of the automobile.

27 **11. Defense, Settlement, Supplementing Payments:** As respects
28 the insurance afforded by the other terms of this policy under
coverage A and B the Company shall:

(a) defend in his name and behalf any suit against
the insured alleging such injury or destruction and
seeking damages on account thereof, even if such
suit is groundless, false or fraudulent; but the
Company may make such investigation, negotiation

1 evidence than would otherwise be necessary when the factual context makes the non-moving
2 party's claim implausible. *British Motor Car Distrib. v. San Francisco Automotive Indus.*
3 *Welfare Fund*, 882 F.2d 371, 374

4 III. NATURE OF DECLARATORY JUDGMENT PROCEEDINGS

5 A declaratory judgment action is a means by which questions related to construction and
6 application of an insurance policy can be judicially determined. Such an action can be brought
7 by a counterclaim. A declaratory judgment proceeding is an appropriate mechanism to
8 determine whether an insurer has a duty to defend and to indemnify its insured. Federal
9 Procedure, Lawyers Edition, §23:35.

10 IV. GENERAL PRINCIPLES - DUTY TO DEFEND AND DUTY TO INDEMNIFY

11 The courts have established certain general principles that are applied in declaratory
12 judgment proceedings related to both duty to defend and duty to indemnify.

13 A. Duty to Defend

14 As a general rule, the following are principles to be applied in determining duty to defend
15 as stated in *Adobe Systems, Inc. v. St. Paul Fire and Marine Ins. Co.*, 2007 WL 3256492 (N.D.
16 Cal.):

- 17 1. Liability insurer owes duty to defend if there is any potential for indemnity coverage;
- 18 2. If there is a possibility of coverage, insurer must defend the entire action;
- 19 3. To interpret the meaning of policy language, the court looks first to the policy
20 provisions. Policy provisions are given their ordinary and popular meaning unless the parties
21 give the term special meaning;
- 22 4. A provision is ambiguous if it is susceptible of two or more reasonable constructions;
- 23 5. An ambiguity is to be resolved against the insurer;
- 24 6. The Court compares the Complaint with the policy language and any relevant
25 extrinsic evidence submitted by the insured to see if there is a possibility of coverage.

26 The *Adobe* principles find support in *Great Western Drywall, Inc. v. Intestate Fire &*
27
28

and settlement of any claim or suit as it deems expedient;

2. **The CAR Policy**

As it relates to the property damage claims made against OKP in the *Atalig v. OKP* lawsuit pending in the Commonwealth Superior Court the CAR Policy states:

Section - Third Party Liability

The Insurers will indemnify the Insured up to but not exceeding the amounts specified in the Schedule against such sums which the insured shall become legally liable to pay as damages consequent upon

a) accidental bodily injury to or illness of third parties (whether fatal or not),

b) accidental loss of or damage to property belonging to third parties occurring in direct connection with the construction or erection of the items insured under Section and happening on or in the immediate vicinity of the site during the Period of Cover.

In respect of a claim for compensation to which the indemnity provided herein applies, the insurers will in addition indemnify the Insured against

a) all costs and expenses of litigation recovered by any claimant from the Insured, and

b) all costs and expenses incurred with the written consent of the Insurer, provided always that the liability of the Insurers under this section shall not exceed the limits of indemnity stated in the Schedule.

VI. **INTERPRETATION OF THE POLICIES - GENERALLY**

A. **Ambiguity**

In this motion the Court is called upon to interpret the language of the policies issued by Dongbu to determine if there is a duty to defend. In interpreting the policy language the Court may need to determine whether there is language in the policy which is ambiguous and therefore construed against Dongbu. In particular, the Court may need to determine whether the term "caused by accident" in the Auto Policy and the term "accidental loss" as that term appears in the CAR Policy are ambiguous as neither term is defined in either policy.

The general principle to be applied in considering language in an insurance policy is set forth in *Clinical Research Institute of Southern Oregon, P.C. v. Kemper Insurance Companies*, 191 Or. App. 595, 84 P.3d 147, 150 (2004):

We first determine whether the policy defined the term at issue and, if it did not, we look to the plain meaning of the term. (citation omitted) If we determine that there are two or more plausible interpretations of the term, then we consider whether those interpretations "withstand scrutiny, *i.e.* continue [] to be reasonable after the interpretations are examined in light of, among other things, the particular context in which the term is used in the policy and the broader context of the policy as a whole." (citation omitted) Only if more than one interpretation remains reasonable after such examination will we conclude that the policy provision is ambiguous. *Id.* If the provision is ambiguous, we construe it against the insurer as the drafter. *Id.*

This interpretation is supported by Commonwealth case law. "A basic principle of construction is that language must be given its plain meaning." *Tudela v. Marianas Pub. Land Corp.*, 1 N.M.I. 179, 185 (1990); "[an insurance] policy will be enforced according to its terms by reading it as a whole. The exception to this rule is where there is an ambiguity, in which case the ambiguous term is interpreted in favor of coverage." *Ito v. Macro Energy Inc.*, 4 N.M.I. 46, at 68 (1993); (emphasis supplied) Citing, *Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 718 P.2d 920, 927 n.7. (Cal. 1986); *United Servs. Auto. Ass'n*, 266 Cal. Rptr. at 692; and *Aim Ins. Co. v. Culcasi*, 280 Cal. Rptr 766, 771 (Ct. App. 1991), review denied; and "In choosing among the reasonable meanings of a promise or agreement or term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds;" "See Restatement (Second) of Contracts § 206 .

The foregoing principle finds support in the recent case of *Adobe Systems, Inc. v. St. Paul Fire and Marine Insurance Co.*, 2007 WL 3256492, 5 (N.D. Cal.):

A policy provision is ambiguous if it is susceptible to two or more reasonable constructions (citation omitted). Any ambiguous terms are interpreted in favor of finding coverage, consistent with the insured's reasonable expectations.

See Also: *Arreguin v. Farmers Insurance Company of Idaho*, 180 P.3d 498, 500 (2008) ([a]ny ambiguity that exists in the contract must be construed most strongly against the insurers.)

The terms "caused by accident" and "accidental loss" being undefined in the policy, if the

1 Court finds that either of those terms is susceptible of two or more reasonable constructions they
 2 are ambiguous and are to be interpreted against Dongbu and in favor of OKP's position of there
 3 being a duty to defend and duty to indemnify OKP for the Atalig claims.

4 **B. Extrinsic Facts/Evidence**

5 No CNMI statutes or cases address what facts CNMI Courts are limited to in determining
 6 whether an insurer has a duty to defend. Nor does the Restatement speak to this issue. Thus, the
 7 Court must look to "the rules of common law ...as generally understood and applied in the
 8 United States" to determine the issue. 7 CMC § 3401.

9
 10 A few states limit the determination to one in which only the facts alleged in the
 11 complaint are compared against the language of the policy. This is commonly referred to as the
 12 "eight corners" test. A significant majority of the states and territories --thirty-three--, however,
 13 do not follow the "eight corners" rule. They instead require insurers, in addition to reviewing the
 14 complaint and the insurance policy, to take into account extrinsic facts that they either know of
 15 or could have reasonably ascertained. As the New Hampshire Supreme Court explained, this is
 16 "to avoid permitting the pleading strategies, whims and vagaries of third party claimants to
 17 control the rights of parties to an insurance contract," *Ross v. Home Ins. Co.*, 773 A.2d 654, 657
 18 (N.H. 2001).³

19
 20
 21 ³ The Alabama Supreme Court "has rejected the argument that the insurer's obligations to defend must be
 22 determined solely from the facts alleged in the complaint in the action against the insured. *Acceptance Ins. Co. v.*
 23 *Brown*, 832 So.2d 1, 14 (Ala. 2001); "The potential for coverage [in Alaska] may be shown either on the face of the
 24 complaint or through facts the insurer knew or could have reasonably ascertained that would bring an otherwise
 25 uncovered complaint within the policy's coverage. *Makarka ex rel. Makarka v. Great American Ins. Co.*, 14 P.3d
 26 964, 969 (Alaska 2000) and *State of Alaska Dep't of Trans. & Pub. Facilities v. State Farm Fire & Cas. Co.*, 939
 27 P.2d 788, 793 (Alaska 1997); An insurer in Arizona has a duty to investigate extrinsic facts advanced by the insured
 28 that suggest potential coverage, *Northern Ins. Co. v. Morgan*, 918 P.2d 1051, 1053 (Ariz. St. App. 1995), *United*
States Fid. Guar. Co. v. Advance Roofing & Supply Co., 788 P.2d 1227, 1331 (Ariz. Ct. App. 1989); An insurance
 company in Arkansas cannot close its eyes to extrinsic facts it knew or should have known, because they were easily
 ascertainable, in determining coverage issues, *Commercial Union Ins. Co. v. Henshall*, 553 S.W.2d 274, 277 (Ark.
 1977), insurer required to look beyond the tort complaint alleging intentional acts to see whether insured's actions
 would potentially be covered, *Smith v. St. Paul Guardian Ins. Co.*, 622 F. Supp. 867 (W.D. Ark. 1985); Facts
 extrinsic to the complaint in California give rise to a duty to defend when they reveal a possibility that the claim may
 be covered by the policy. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 19, 900 P.2d 619, 627 (Cal. 1995),
Scottsdale Ins. Co. v. MV Transp., 115 P.2d 460, 466 (Cal. 2005); Connecticut rejects strict application of the four

corners rule, and instead requires the insurer to provide a defense when it has actual knowledge of facts establishing a reasonable possibility of coverage, *Hartford Cas. Ins. Co. v. Litchfield Mut. Fire Ins. Co.*, 876 A.2d 1139, 1146 (Conn. 2005); In Georgia if the insured notifies the insurer of facts that would place the claim within the policy coverage, the insurer is obligated to conduct an investigation into the insured's contentions and base its decision on the duty to defend on "true facts," *Penn-America Ins. Co. v. Disabled Veterans, Inc.*, 490 S.E.2d 374, 376 (Ga. 1997); Where the insured in Hawaii tenders its defense in a lawsuit in which the complaint does not clearly and unambiguously assert a covered claim, the insurer, as a precondition to refusing the tender on the ground that there is no possibility of coverage, must conduct a reasonable investigation to ensure that the facts of the case do not obligate it to defend the insured, *Dairy Road Partners v. Island Ins. Co., Ltd.*, 992 P.2d 93, 107 (Haw. 2000); The insurer in Illinois must defend if it possesses knowledge of true but unpleaded facts that, when taken together with the allegations of the complaint, indicate that the claim is potentially within the policy coverage, *National Union Fire Ins. Co. v. Olson Constr.*, 329 Ill. App. 3d 228, 234, 769 N.E.2d 977, 981 (2d Dist. Ill. 2002), *State Farm Fire & Cas. Co. v. Tillerson*, 334 Ill. App.3d 404, 407, 777 N.E.2d 986, 989 (5th Dist. Ill. 2002); The duty to defend in Indiana is determined from the allegations contained in the underlying complaint and from those facts known or reasonably ascertainable by the insurer after reasonable investigation, *Trailer v. Indiana Ins. Co.*, 575 N.E.2d 1021, 1023 (Ind. Ct. App. 1991), *Cincinnati Ins. Co. v. Mallon*, 409 N.E.2d 1100, 1105 (Ind.Ct. App. 1980); In Iowa, a liability insurer should generally consider facts beyond the allegations of the petition in determining whether to tender a defense, *Talen v. Employers Mut. Cas. Co.*, 703 N.W.2d 395, 405 (Iowa 2005); In Kansas, for purposes of whether a defense must be provided "an insurer must look beyond the effect of the pleadings and must consider any facts brought to its attention or any facts which it could reasonably discover in determining whether it has a duty to defend. If those facts give rise to a 'potential of liability,' even if remote, under the policy, the insurer bears a duty to defend... The duty to defend rests primarily on the possibility that coverage exists, and the possibility of coverage must be determined by a good faith analysis of all information the insurer may know or could have reasonably ascertained." *Aselco, Inc. v. Hartford Ins. Group*, 21 P.3d 1011, 1018 (Kan. Ct. App. 2001); In Kentucky, the determination of the duty to defend must be made "by reference to the complaint and known facts," *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001); In Maine, the insurer cannot avoid its duty to defend by establishing, before the underlying action has concluded, that ultimately there will be no duty to defend, *York Ins. Group of Me. v. Lambert*, 740 A.2d 984, 986 (Me. 1999), *Penny v. Capital City Transfer, Inc.*, 707 A.2d 387, 388 (Me. 1998); In Maryland, extrinsic evidence should be considered by the insurer but is must "relate in some manner to a cause of action actually alleged in the complaint," *Moscarillo v. Professional Risk Mgmt. Servs., Inc.*, 921 A.2d 245 (Md. 2007); In Massachusetts, the scope of the insurer's duty to defend is "based not only on the facts alleged in the complaint but also on the facts that are known or readily knowable by the insurer," *Dilbert v. Hanover Ins. Co.*, 825 N.@. 2d 1071, 1075 (Mass. App.Ct. 2005); The duty to defend cannot be limited by the precise language of the pleadings in Michigan, the insurer has the duty to look behind the third party's allegation to analyze whether coverage is possible, *Citizens Ins. Co. v. Pro-Serv. Group*, 730- N.W.2d 682, 289 (Mich. 2007); In Minnesota, "[t]he complaint ...does not control [the duty to defend] when actual facts clearly establish the existence or nonexistence of the duty to defend," *Fluoroware, Inc. v. Chubb Group of Ins. Cos.*, 545 N.W.2d 678, 681 (Minn.Ct.App. 1996); Under Mississippi law an insurer has a duty to defend when it "has knowledge, or could obtain knowledge through a reasonable investigation, of the existence of facts that trigger coverage," *American States Ins. Co., v. Natchez Steam Laundry*, 131 F.3d 551, 553 (5th Cir. 1998); In Missouri, "even if the pleadings do not show coverage, where known or reasonably ascertainable facts become available that show coverage[,] the duty to defend devolves upon the insurer," *King v. Continentall Western Ins. Co.*, 123 S.W.3d 259, 264 (Mo.Ct.App. 2003); Coverage under an insurance policy is determined upon the facts giving rise to the claim in Montana, not any legal theories contained in the complaint. *Brabeck v. Employer's Mut. Cas. Co.*, 16 P.3d 355 (Mont. 2000), *Burns v. Underwriters Adjusting Co.*, 765 P.2d 712 (Mont. 1988); "In determining its duty to defend [in Nebraska], an insurer must not only look to the petition or complaint filed against its insured, but must also investigate and ascertain the relevant facts from all available sources," *Peterson v. Ohio Cas. Group.*, 724 N.W.2d 765, 774 (Neb. 2006); An inquiry into the underlying facts of a claim in New Hampshire is required in determining the duty to defend "to avoid permitting the pleading strategies, whims and vagaries of third party claimants to control the rights of parties to an insurance contract," *Ross v., Home Ins. Co.*, 773 A.2d 654, 657 (N.H. 2001); In New Jersey, facts extrinsic to the complaint but known to the insurer may trigger the duty to defend, *SL Indus. Inc. v. American Motorists Ins. Co.*, 128 N.J. 188, 199-200, 607 A.2d 1266, 1272 (NJ 1992); In New Mexico, "[a]n insurance company is required to conduct such investigation into the facts and circumstances underlying the complaint against its insured as is reasonable given the factual information provided by the insured or provided by the circumstances surrounding the claim in order to determine

As reflected by footnote 3, the Court is not strictly limited in its determination of duty to defend and duty to indemnify to comparing the four corners of the policy to the four corners of the Complaint. Under appropriate circumstances the court may consider extrinsic facts either known to the insurer, facts which the insurer could have ascertained upon reasonable investigation, or facts which may have previously been determined:

The case of *Montrose Chemical Corp. of California v. Superior Court*, 6 Cal. App. 4th, 287, 861 P.2d 1153, 1157 (1993) supports the foregoing principle regarding extrinsic facts, saying:

"The determination whether the insurer owes a duty to defend is usually made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint may also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy."
(citation omitted)

Gray made clear that facts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy (citation omitted) *Id.*, 1158.

whether it has a duty to defend," *G&G Servs., Inc. v. Agora Syndicate, inc.*, 993 P.2d 751 (N.M.Ct.App. 1999); In *New York*, extrinsic facts can be used to show that there is a duty to defend, *International Business Machines Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 426 (2d Cir. 2002), *Petr-All v. Fireman's Ins. Co.*, 188 A.D.2d 139, 141 (4th Dept. N.Y. 1993); Where a *North Carolina* liability insurer knows or reasonably could ascertain facts that, if proven, would be covered by its policy, it has a duty to defend even if the facts as alleged in the complaint appear to be outside coverage or within an exception to coverage, *Nationwide Mut. Fire Ins. Co. v. Grady*, 502 S.E.2d 648 (N.C. Ct. App. 1998); The United States Court of Appeals for the Eighth Circuit has predicted that the *North Dakota* Supreme Court would hold that the insurer is required to defend if facts outside the underlying complaint come to the insurer's attention and "establish a reasonable possibility of coverage," *Pennzoil Co. v. united States Fid. and Guar. Co.*, 50 F.3d 580 (8th Cir. 1995); "In *Oklahoma*, the insurer's defense duty is determined on the basis of information gleaned from the petition (and other pleadings), from the insured and from other sources available to the insurer at the time the defense is demanded (or tendered)," *First Bank of Turley v. Fid. & Deposit Ins. Co.*, 928 P.2d 298, 3030-04(Okla. 1996); If an insurer in *South Dakota* possesses knowledge of facts beyond the complaint that implicate potential coverage, than it is obligated to defend, *Stoebner, v. S.D. Farm Bureau Mut. Inc. Co.*, 598 N.W.2d 557, 559 (S.D. 1999); In *Washington*, readily ascertainable facts outside the complaint should be considered when determining a duty to defend, *Truck Ins. Exch., v. Vanport Homes, inc.*, 58 P.3d 276, 282 (Wash. 2002); In *West Virginia*, an insurer must look beyond the bare allegations of the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide, *State Auto Mut. Ins. Co., v. Alpha Eng'g Servs., Inc.* 542 S.E.2d 876, 879 (W.Va. 2000); In *Guam* the duty to defend is triggered by focusing on the facts in the complaint and those known to the insurer "regardless of the technical legal cause of action pleaded by the third party," *National Union fire Ins. Company of Pittsburg v. Guam Housing & Urban Renewal Authority*, 2003 WL 22497996 [22].

1 The court concluded that facts extrinsic to the Complaint can generate a duty to defend as well as
 2 defeat a duty to defend. The point is that the Court is not always required to the apply the "eight
 3 corners" rule.

4 Further support for the Court's consideration of extrinsic facts/evidence is found in the
 5 following authority:

6 1. *Great Western Drywall, Inc. v. Intestate Fire & Ca. Co.*, 74 Cal. Rptr. 3d 657, 662 (2008)

7 "[T]he determination of whether the duty to defend arises is made
 8 by comparing the terms of the policy with the allegations of the
 9 complaint and any known extrinsic facts, and any doubt as to
 10 whether the facts create a duty to defend is resolved in favor of the
 insured." (citation omitted)

11 2. *Aetna Casualty and Surety Co., Inc. v. Centennial Ins. Co.*, 838 F.3d 436, 350 (1988):

12 An insurer's duty to defend must be analyzed and determined on
 13 the basis of any potential liability arising from the facts available
 14 to the insurer from the Complaint or other sources available to it at
 15 the time of the tender of defense. (citation omitted) The insurer's
 16 obligation to defend is not dependent on the facts contained in the
 complaint alone; the insurer must furnish a defense when it learns
 of facts from *any* source that creates a possibility of coverage
 under its policy. (citation omitted) (ital. in decision)

17 3. *Pac Indemnity v. Run-A-Ford Co.*, 161 So.2d 789, 794-795 (1964)

18 In the case at bar, insurer, by its policy, agreed, 'With respect to
 19 such insurance as is afforded by this policy for bodily injury
 20 liability,' to defend 'any suit against insured alleging *such injury*.'
 21 We have undertaken to show that the complaint in the action at
 22 law, with respect to the insurance afforded by the instant policy,
 23 does allege 'such injury.' We are of opinion that in deciding
 24 whether a complaint alleges such injury, the court is not limited to
 the bare allegations of the complaint in the action against insured
 but may also look to facts which may be proved by admissible
 evidence in suit for declaratory relief such as the instant case. (ital.
 in decision)

25 4. *Fagerstedt v. Continental Ins. Co.*, 72 Cal. Rptr. 126, 127, 266 Cal. App.2d 370, 372 (1968).

27 Relevant facts in addition to those alleged in appellant's complaint
 28 are subject to judicial notice. The rule has long been established in

1 California 'that in the consideration of a pleading the courts must
2 read the same as if it contained a statement of all matters of which
3 they are required to take judicial notice, even when the pleading
contains an express allegation to the contrary.' (citation omitted)

4 5. *Nationwide Ins. v. Zavalis*, 52 F.3d 689, 695 (1995):

5 Courts will therefore on occasion look beyond the complaint to
6 evidentiary materials that may shed additional light on the duty to
7 defend, so long as doing so does not involve them in factfinding
that may overlap or interfere with the underlying litigation.

8
9 To OKP's knowledge at no time did Dongbu undertake any reasonable investigation into
10 the allegations of Plaintiff's Complaint(s) to make a determination of its obligations under the
11 policy. Without making any attempt to investigate the claim Dongbu denied coverage and now
12 relies on its own inaction as a basis for refusing to defend and indemnify. Dongbu knew about
13 the filing of the original complaint by virtue of knowledge of its agent, Moylan's, and received
14 copies of the First and Second Amended Complaints and did nothing. Under the circumstances
15 of this case, extrinsic facts/evidence should be considered by the court in its determination of the
16 issuance of duty to defend and duty to indemnify.

17 Had Dongbu conducted even the most cursory investigation it would have learned that it
18 was OKP's position that: "Atalig never mentioned any latte stones, other Chamorro artifacts, or
19 Japanese ruins being on his property to Brian Chen or anyone else.... *Chen May 16, 2006*
20 *Declaration*, ¶ 7; and that the Lease Atalig refers to in the Complaints and attaches to them, was
21 entered into fraudulently by Atalig. *Chen May 16, 2006 Declaration*, ¶¶13-17.

22 In addition, Dongbu had conducted the simplest of investigations by merely reviewing
23 the public filings in the underlying Atalig lawsuit it would have learned of many of the true
24 events surrounding the clearing, the primary act that is at issue in the case, because they have
25 already been determined by the CNMI Superior Court. For instance, Judge Naraja, in his
26 January 30, 2008 *Order Granting in Part and Denying in Part Defendants OKP and Chen's*
27 *Motion for Partial Summary Judgment and Granting Defendants' Motion to Strike*, (Frink
28 Declaration, Exhibit "26.")(the "Naraja Summary Judgment Decision") reviewed the parties

1 undisputed facts and determined what actually happened at the time a portion of the Atalig
2 property was cleared by OKP, the clearing that Atalig claims destroyed his valuable Chamorro
3 and Japanese artifacts. The Naraja Summary Judgment Decision determined the following to be
4 the true manner in which the clearing took place:

5 1. OKP Project Engineer Prasada Reddy Goluguri was allegedly informed by
6 Atalig's former Hotel Manager Edita Carillo not to disturb an area of the Atalig property.
7 Carillo did not tell Goluguri why not to disturb that area, just not to.

8
9 2. Goluguri demarcated corners of a 100' x150" box for OKP Heavy Equipment
10 operator Pramuan Jaiphakdee to clear. The demarcated box did not include the area that Carillo
11 told Goluguri not to clear (this is the same area that Atalig subsequently claimed included the
12 destroyed Chamorro and Japanese artifacts). Goluguri approved Jaiphakdee to clear within the
13 box after viewing the area that had been demarcated.

14 3. Jaiphakdee then, after clearing the box, **independently** made the decision to push
15 the cleared debris piles outside of the box and into the "do not disturb" area.

16
17 4. Jaiphakdee had no knowledge of the existence of the allegedly destroyed artifacts.

18 5. Jaiphakdee's alleged destruction of the artifacts was "negligent at best."

19 *Naraja Summary Judgment Decision*, pgs. 4-7.

20
21 Extrinsic facts/evidence are available from the underlying action which leads to the
22 conclusion there is coverage.

23 C. **Exclusions - Generally**

24 In considering the various exclusionary provisions which Dongbu says apply, it must be
25 kept in mind that the burden is on Dongbu to show the exclusion is applicable to defeat coverage.
26 Exclusionary clauses are to be strictly construed against the insurer and any ambiguity is to be
27 resolved in favor of the insured:

28 1. *Frogner v. American Community Mutual Insurance Company*, 502 N.W. 2d 350, 352 (1993):

Exclusionary clauses are to be strictly construed against the insured. (citation omitted)

2. *Arreguin vs. Farmers Insurance Company of Idaho*, 180 P.3d 498, 500, 501 (2008)

A provision that seeks to exclude the insurer's coverage must be strictly construed in favor of the insured. (citation omitted). The "burden is on the insurer to use clear and precise language if it wishes to restrict the scope of its coverage." (citation omitted)

Furthermore, a provision excluding coverage is strictly construed in favor of the insured and the insurer has the burden to use clear and precise language if it is restricting the scope of its coverage. (citation omitted)

3. *Greenwich Insurance Company v. RPS Products, Inc.*, 882 N.E.2d 1202, 1208 (2008)

Where an exclusionary clause is relied upon to deny coverage, its applicability must be clear and free from doubt because any doubts as to coverage will be resolved in favor of the insured. (citation omitted)

VII. INTERPRETATION OF AND COMPLIANCE WITH DONGBU POLICIES

"Caused By Accident" And "Accidental Loss"

Dongbu contends there is no coverage under either policy because the Atalig claims were neither "caused by accident" under the Auto Policy or an "accidental loss of or damage to property" under the CAR Policy.

The Auto Policy Insuring Agreement for property damage liability states:

Coverage B. Property Damage Liability: To indemnify the insured for all sums which he shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile. (emphasis supplied)

The CAR Policy with respect to property damage liability states:

The Insurer will indemnify the Insured up to but not exceeding the amounts specified in the Schedule against such sums which the insured shall become legally liable to pay as damages consequent upon

(b) accidental loss of or damage to property belonging to third parties.

occurring in direct connection with the construction or erection of items insured under Section and happening on or in the immediate vicinity of the site during the period of cover. (emphasis supplied)

An examination of both the Auto Policy and the CAR Policy shows that the terms "caused by accident" and "accidental loss" are not defined in either policy. In such case it is the Court's function to determine what meaning should be given to these terms or whether the failure of Dongbu to define the terms in the policies makes the terms ambiguous and therefore construed in favor of coverage for OKP.

A. **"Caused by accident"**

Dongbu's Complaint at paragraph 34 sets out the policy language with regard to property damage liability and at paragraph 35 alleges that the companion provision under Coverage A for personal injury liability is similarly applicable. Then Dongbu alleges in paragraph 35 as the sole basis for denial of coverage the following:

The conduct made the basis of the claim is not an "accident" according to the plain meaning of the term.

What is an accident? An accident is to be viewed from the perspective of the insured and has been defined as an event with unintended results. The Court is directed to the following authority:

1. *Allstate Insurance Company v. McCarn*, 446 Mich. 277, 645 N.E.2d 20, 23 (2002):

Accidents are to be evaluated from the standpoint of the insured, not the injured party. (citation omitted) In *Masters* we held that "the appropriate focus of the term 'accident' must be both '*the injury causing act or event*' and its relation to the resulting property damage or personal injury." (citation omitted) (italics in decision)

What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk

1 of harm from which the consequences should reasonably have
2 been expected by the insured.

3 2. *McGroarty v. Great Am. Ins. Co.*, 36 N.Y.S. 2d 358, 329 N.E.2d 172, 174-175 (1975)

4 One often contemplates and envisions a sudden or catastrophic
5 event when considering the term accident - an event which is
6 unanticipated and the product of thoughtlessness rather than
7 willfulness. But a broader view must be taken of the term for
8 otherwise how could we classify catastrophic results which are the
9 unintended fruits of willful conduct. Certainly one may intend to
10 run a red light, but not intend that the catastrophic results of
11 collision with another car occur. Calculated risks can result in
12 accidents. Judge Cardozo framed the situation perfectly in
13 *Messersmith vs. American Fid. Co.*, 232 N.Y. 161, 133 N.E. 432 in
14 which he advanced similar illustrations and stated: 'Injuries are
15 accidental or the opposite, for the purpose of indemnity, according
16 to the quality of the results rather than the quality of the causes.'

17 We agree also that it is not legally impossible to find accidental
18 results flowing from intentional causes, i.e. that the resulting
19 damage was unintentional although the original act or acts leading
20 to the damage were intentional.

21 [b]ut we hold that the relevant context to be considered is the fact
22 that it is a word [accident] employed by an insurer in the contract
23 and should be given the construction most favorable to the insured.
24 Thus, regardless of the initial intent or lack thereof as it relates to
25 causation, or the period of time involved, if the resulting damage
26 could be viewed as unintentional by the fact finder the total
27 situation could be found to constitute an accident. *Id.* 175
28 (emphasis supplied)

3. *Shelby Casualty Insurance Company v. H.T.*, 391 N.J. Supp. 406, 918 A.2d 659, 661 (2007)

It is by now well settled that "the accidental nature of an
occurrence is determined by analyzing whether the wrongdoer
intended or expected to cause an injury. If not, then the resulting
injury was 'accidental', even if the act that caused the injury was
intentional." (citation omitted) The controlling issue, then, is
whether the insured intended or expected to cause harm to the
victims. (citation omitted)

Generally, the intent or expectation of injury is a subjective
inquiry, requiring a determination of what the insured actually
intended or expected. (citation omitted)

1 4. *Quincy Mutual Fire Insur. Co. v. Abernathy*, 393 Mass. 81, 469 N.E. 797, 799 (1984)

2 This court consistently has stated that the resulting injury which
3 ensues from the volitional act of an insured is still an "accident"
4 within the meaning of an insurance policy if the insured does not
5 specifically intend the resulting harm or is not substantially certain
6 that such harm will occur.

7 5. *Herrera v. C.A. Seguros Catatumbo*, 844 So. 2d 664, 667 (2003)

8 Recently the Florida Supreme Court held that "where the term
9 'accident' in a liability policy is not defined, the term, being
10 susceptible of varying interpretations, encompasses not only
11 'accidental events', but also injuries or damages neither expected
12 nor intended from the standpoint of the insured." (citation omitted)
13 As the Supreme Court explained, under this formulation, "if the
14 resulting damages are unintended, the resulting damage is
15 'accidental even though the original acts were intentional.'
16 (citation omitted)

17 There being significant authority that "accident" can be an event with unintentional
18 results, what then does the term "caused by accident" mean? It means that where an insurer
19 premises coverage on a loss "caused by accident" an intentional act with unintentional results
20 comes within the definition of "caused by accident" and there is coverage.

21 In *Fidelity and Cas. Co. of New York v. Wrather*, 652 S.W. 2d 245, 259 (1983) the court
22 interpreted a provision in a liability policy which provided the insurer would:

23 " 1. pay damages which an insured becomes legally liable to pay
24 because of a ... b. damage to or destruction of property including
25 loss of use, caused by accident resulting from the ownership,
26 maintenance or use of your car; and ... 2. defend any suit against
27 an insured for such damages with attorneys hired and paid by us
28 ... " (emphasis supplied)

The claim against the insured was for damages alleged to have been the result of the insured
setting fire to wheat stubble near a highway. The fire created smoke which obscured the vision
of those using the highway and was the alleged causal connection of vehicle damage on the
highway. State Farm contended the alleged damage was not "caused by accident" because the
insured intentionally started the fire. The court disposed of the State Farm's contention in the

1 following manner:

2 [t]he term "caused by accident," as used in policies of liability
3 insurance, is satisfied where the insured did not intend that damage
4 result from his act although the act itself was intentional and did so
5 result.

6 In *McAllister v. Hawkeye - Security Ins. Co.*, 68 Ill. App. 2d 222, 215 N.E.2d 477, 481
7 (1966) a claim was made for damage resulting from earth moving activities. The insured's
8 policy provided coverage for "[d]amages because of injury to or destruction of property, ...
9 caused by accident and arising out of the ownership, maintenance or use of the insured's
10 equipment." The defense was tendered to the insurer which refused coverage. In a subsequent
11 declaratory judgment proceeding the insurance company took the position that its insured's acts
12 were deliberate, voluntary and intentional and therefore the ensuing loss was not the result of an
13 accident. The Court found that while the insured intended to move earth, he didn't intend to do
14 damage to a third party's land; that the damage was unforeseen and unexpected in the course of
15 an intentional act. In finding coverage the Court stated:

16 In the case at bar, we likewise believe that the damage to the Foss'
17 land was not intentionally caused by plaintiff, but rather, was the
18 unintentional result of an intended act directed at other property.
19 Since there was not intent to damage Foss' land, the resulting harm
20 was 'caused by accident.'

21 In interpreting the term "caused by accident" the Court in *Haynes v. American Casualty*
22 *Company*, 228 Md. 394, 179 A.2d 900, 904 (1962) said:

23 In our view, to hold that recovery under such a provision (caused
24 by accident) is limited to those situations where not only the result
25 was unintentional, but also where the means were accidental,
26 would place too narrow an interpretation upon the phrase. As the
27 conflicting findings in other jurisdictions and as the language itself
28 would indicate, the phrase is somewhat ambiguous. We have
made it clear that where an insurance company, in attempting to
limit coverage, employs ambiguous language, the ambiguity will
be resolved against it as the one who drafted the instrument, as is
true in the construction of contracts generally.

"Caused by accident" was interpreted by the case of *Meyer v. Pacific Employers*

1 *Insurance Company*, 233 Cal.App.2d 321, 43 Cal. Rptr. 542, 547 (1965) as follows:

2 The fact that an act which causes an injury is intentional does not
3 take the consequence of that act outside of coverage of a policy
4 which excludes damage unless caused by accident for if the
5 consequence that is the damage or injury is not intentional and is
6 unexpected it is accidental in character. (citation omitted)

7 What we have in this case is clearly an incident that was caused by accident. OKP's
8 heavy equipment operator was asked to clear an area of the property that did not include any
9 artifacts. He cleared that area, then, not knowing that there were any artifacts in another area,
10 pushed the debris from the area he was asked to clear into the area that Atalig claims contained
11 artifacts. This is clearly an unintentional consequence, on the part of both OKP and the heavy
12 equipment operator. OKP did not ask the operator to clear the area containing the artifacts. The
13 operator did not know that the artifacts existed in the additional area that he cleared without
14 OKP's approval. Under these circumstances, the claimed loss was "caused by accident" and
15 therefore Dongbu should provide coverage under the Auto Policy.

16 B. **"Accidental loss"**

17 Dongbu's Complaint at paragraph 43 in alleging the basis for refusing coverage under the
18 CAR Policy states:

19 The third party liability coverage is only applicable to "accidental
20 loss of or damage to property." CAR coverage form, Third Party
21 Liability Section. The claims in the lawsuit are not based on
22 accidental loss according to the plain meaning of the term or legal
23 authority that has construed that language.

24 As previously noted, the CAR Policy does not define the term "accidental loss" and
25 therefore the Court must determine how the term should be interpreted.

26 The word "accidental" has been defined as follows:

27 *Meyer v. Pacific Employers Ins. Co.*, 233 Cal. App.2d 321, 327 43 Cal,Rptr. 542 (1965)

28 The fact that an act which causes injury is intentional does not take
 the consequence of that act outside the coverage of a policy which
 excludes damage unless caused by accident for if the consequence

that is the damage or injury is not intentional and is unexpected it is accidental in character.

Winchester v. Prudential Life Ins. Co. of America, 975 F.2d 1479, 1487 (1992)

We are convinced that the Utah courts currently use the less strict standard of defining "accidental" as a result not reasonably foreseeable even if the means causing the result was foreseeable or even intentional.

American Alternative Ins. Corp. v. Superior Court, 135 Cal.App. 4th 1239, 1247 37 Cal. Rptr.3d 918 927 (2006)

"Accidental" in an insurance policy ordinarily means unintended and unexpected by the insured."

These definitions have one thing in common: "accidental" means an unintended and unforeseeable result.

"Accidental loss" was defined in *Tuttle v. Allstate Insurance Company*, 134 Wash. App. 120, 138 P.3d 1107, 1111 (2006) as follows:

The ordinary meaning of an accidental loss is "when [something] happens without design, intent or obvious motivation."

In *State Farm Mut. Auto Ins. Company v. Kelly*, 945 S.W.2d 905, 908, 910 (1997) the court said:

The Texas Supreme Court has recognized that a loss or injury is accidental when it is "not the natural and probable consequence of the means which produce it. (citations omitted) In other words, accidental loss is one that does not ordinarily follow and *cannot be reasonably anticipated from the producing act.* (citation omitted) An accidental loss is one the actor did not intend to produce (citation omitted) (emphasis supplied) (italics in orig).

An accidental loss occurs when it is not the natural and probable consequence of the act which produces it, or does not ordinarily flow and cannot be reasonably anticipated from the act. *Id.* 910.

It is clear that the alleged damage to the artifacts which Atalig claims was an unintended and unforeseen consequence. The heavy equipment operator, Pramuan Jaiphakdee, did not know that the artifacts existed in the additional area he pushed the debris into. OKP only instructed Jaiphakdee to clear an area that did not include the artifacts. Clearly, neither Jaiphakdee or OKP

1 intended the alleged loss of the artifacts to occur. This constitutes an "accidental loss" within the
2 property damage liability coverage of the CAR policy and triggers a duty to defend.

3 **C. No Failure To Comply With Notice Requirements**

4 Both the Auto Policy and the CAR Policy have provisions regarding notification by the
5 insured to the insurer. Those provisions state:

6 1. **Notice Under the Policies**

7 The Auto Policy - Conditions

8
9 **2. Notice of Accident - Coverage A, B and C:** When an accident occurs written
10 notice shall be given by or on behalf of the insured to the Company or to any of
11 its authorized representative as soon as practicable. Such notice shall contain
12 particulars sufficient to identify the insured and also reasonably obtainable
information regarding the time, place and circumstances of the accident, the
names and addresses of the injured and of available witnesses.

13 **3. Notice of Claim of Suit - Coverage A and B:** If claim is made or suit is
14 brought against the insured, the insured shall immediately forward to the company
every demand, notice, summons or other process received by him or his
representative.

15 The Car Policy - Conditions

16 The applicable notification provision of the CAR Policy states:

17 5. In the event of any occurrence which might give rise to a claim
18 under this Policy, the Insured shall

19 a) immediately notify the Insurers by telephone or telegram as well
20 as in writing, giving an indication as to the nature and extent of
loss or damage;

21 The Insurers shall not in any case be liable for loss, damage or
22 liability of which no notice has been received by the Insurers
within 14 days of its occurrence.

23 Upon notification being given to the Insurers under this condition,
24 the Insured may carry out the repairs or replacement of any minor
25 damage; in all other cases a representative of the Insurers shall
26 have the opportunity of inspecting the loss or damage before any
27 repairs or alterations are effected. If a representative of the Insurers
28 does not carry out the inspection within a period of time which
could be considered adequate under the circumstances, the Insured
is entitled to proceed with the repairs or replacement.

When addressing the issue of notification to Dongbu of the claims and suit made by Atalig, the following CNMI statutes from the Insurance Code must be taken into consideration:

1. 4 CMC §7505(c) *Notice of Loss*. Failure to give notice of loss covered by marine or fire insurance within any period provided for by the policy or otherwise does not exonerate the insurer if the notice is given within a reasonable time after the insured has or should have first-hand knowledge of the loss. In all other classes of insurance, the insured shall have at least 20 days after the event within which to give notice of loss. No requirement of notice within a lesser period is valid.
2. 4 CMC §7505(e) *Waiver of Defects in Notice or Preliminary Proof*. All defects in a notice of loss, or in a preliminary proof thereof, which the insured might remedy, and which the insurer omits to specify to the insured, without unnecessary delay, as grounds of objection, are waived.
3. 4 CMC §7505(f) *Waiver of Delay*. Delay in the presentation to an insurer of notice, or preliminary proof of loss, is waived if caused by an act of the insurer, or if the insurer omits to make objection promptly and specifically upon that ground. (emphasis supplied)

These provisions become significant in this case as Dongbu relies heavily in its allegations that OKP failed to give timely notice of the Atalig claim or to tender defense of the Atalig suit in a timely manner. The undisputed facts are that timely notice of the claim and subsequent tender of defense was made. Additionally, Dongbu by its inaction after being notified of the claim and subsequent suit has waived any defense of failure to give notification.

In considering the notification issue, it must be kept in mind that the Atalig suit involves three (3) different Complaints:

1. Original Complaint filed March 23, 2006; Exhibit 8 to Frink Declaration;
2. Verified First Amended Complaint filed July 31, 2006; Exhibit 9 to Frink Declaration; and
3. Second Amended Complaint filed April 18, 2007; Exhibit 11 to Frink Declaration.

Original Complaint

The original Complaint was filed on March 23, 2006. On March 24, 2006 articles regarding the lawsuit appeared in both the Marianas Variety and the Saipan Tribune (See Exhibits 2 and 3 to Chen Declaration). Within a week or so of March 24, 2006, Brian Chen visited the offices of Moylan's Insurance on an unrelated matter; Moylan's is the authorized agent for Dongbu in the CNMI and the agent that placed the Auto Policy and CAR Policy with Dongbu. On that occasion Brian Chen had a conversation with Cecilia A. Anas, Surety Division

1 Manager, of Moylan's Insurance Underwriters, Inc. who advised that she had seen at least one of
2 the March 24, 2006 newspaper articles and she remarked it looked like a ridiculous lawsuit. At
3 that point in time Dongbu's agent had knowledge of the pending lawsuit.

4
5 First Amended Complaint

6 When the First Amended Complaint was filed on July 31, 2006, a copy was delivered by
7 Brian Chen of OKP to Cecilia A. Anas, Surety Division Manager of Moylan's Insurance
8 Underwriters, Inc. on August 9, 2006 and defense and indemnification was requested. Ms. Anas
9 advised Mr. Chen that she would discuss the matter with Dongbu. (Chen Declaration). Delivery
10 of the First Amended Complaint to Ms. Anas clearly meets the notification and tender
11 requirements of both the Auto Policy and the CAR Policy.

12 Second Amended Complaint

13 Additionally, when the Second Amended Complaint was filed on April 18, 2007 a copy
14 was delivered to Thomas Clifford on May 3, 2007, the attorney for Dongbu who was handling
15 this matter. Dongbu received timely notice of the Second Amended Complaint and the defense
16 was therefore tendered timely.

17 2. Notification was timely

18 Unquestionably, timely notification and tender of defense was made under both the Auto
19 Policy and CAR Policy as far as the First Amended Complaint and Second Amended Complaint
20 are concerned. Regarding knowledge by Moylan's of the filing of the original Complaint,
21 knowledge of Moylan's as General Agent⁴ for Dongbu is knowledge of Moylan's and as such the
22 notification of suit provision of the policy has been satisfied and such knowledge triggers the
23 duty of Dongbu to fulfill its obligations under the policies to OKP.

24 In the CNMI a General Agent under the Insurance Code is defined as follows:
25

26 4 CMC §7303 **General Agents, Subagents, Adjusters, and**
27 **Solicitors Defined.**

28 ⁴ Both the Auto Policy and CAR Policy state Moylan's is the General Agent for Dongbu Insurance Co., Ltd.

1 (a) *General Agent*.

2 (1) "General Agent" means any person appointed
3 under 4 CNMI §7301(b)(1)(D) and authorized by
4 the insurer to perform any of the following acts in
the Commonwealth:

5 (A) Solicit application for insurance;

6 (B) Effectuate and countersign insurance contracts;

7 (C) Collect premiums on insurance applied for or
8 effectuated;

9 (D) Appoint subagents and solicitors;

10 (E) Any other lawful acts pursuant to this decision.

11 The designation of Moylan's as General Agent for Dongbu and knowledge by Moylan's of the
12 original suit filed by Atalig is notice to Dongbu.

13 The general rule of agency that the principal is chargeable with,
14 and is bound by, the knowledge of or notice to his or her agent
15 received while the agent is acting within the scope of his or her
16 authority, and which is in reference to a matter over which his or
17 her authority extends, is fully applicable to agents of insurance
18 companies. The general rule of insurance law is that the
19 knowledge of or notice to an insurance agent as to a matter within
the scope of his or her authority, is chargeable to the insurer. The
agent's knowledge is in law the knowledge of the insurer,
therefore, even if such knowledge on the part of the agent is not in
fact communicated to the insurer.

20 44A Am.Jur. 2d Insurance, §1553

21 This general principle is supported by the following authority:

22 1. *Couch on Insurance (3Ed.)*, §49:2 Effect of Agent's Failure to Inform Insurer.

23 Although the rule which imputes the agent's knowledge to the
24 principal is predicated upon the assumption that the agent will
25 communicate such matters to its principal, it is immaterial whether
26 the agent actually does so, for in either case it is held that the
knowledge of the agent is the knowledge of the insurer.

27 2. *Major Oil Corp. v. Equitable Life Assur. Soc. of U.S.*, 457 F. 2d 596, 603 (1972):
28

Equitable concedes that the general rule is that knowledge obtained by an agent of the insurer while acting within the scope of his authority is imputed to the insurer, whether such is actually communicated or not.

3. **Dongbu waived any defect in Notice**

Notwithstanding OKP's compliance with the suit notification requirements of the Auto Policy and CAR Policy, Dongbu has waived any reliance on lack of notice because of its failure to comply with 4 CMC §7505(e) which states:

4 CMC §7505(e) *Waiver of Defects in Notice or Preliminary Proof*. All defects in notice of loss, or in a preliminary proof thereof, which the insured might remedy and which the insurer omits to specify to the insured, without unnecessary delay, as grounds for objection, are waived.

and

failure to comply with 4 CMC §7505(f) which states:

4 CMC §7505(f) *Waiver of Delay*. Delay in the presentation to an insurer of notice, or preliminary proof of loss, is waived if caused by an act of the insurer, or if the insurer omits to make objection promptly and specifically upon that ground.

In considering the applicability of these two statutes Dongbu finds itself in the awkward situation of saying that a delay in notification of the filing of the original complaint for approximately 4 months (from late March to early August, 2006) and tendering defense of the First Amended Complaint in early August, 2006 voids coverage, yet failure of Dongbu to respond to the tender of the defense until March, 2007 (a period of approximately 7 months) does not violate either statute. Any lack of notice has been waived by Dongbu by its failure under 4 CMC §7505(e) to specify the grounds of its objections without unnecessary delay and under 4 CMC §7505(f) to object promptly and specifically about delay in presentation of notice.

D. **No Prejudice to Dongbu**

Also to be considered is that Dongbu cannot demonstrate that it has been prejudiced by any delay in notification; it should be emphasized that OKP disputes there has been any delay in

1 lack of notification. Dongbu does not make any allegation that delay in notification has been
 2 prejudicial. Dongbu's First Amended Complaint alleges:

3 32. The Auto Policy declarations page requires "immediate"
 4 notice of claims be provided to the claims adjusting company
 5 indicated. The Auto Policy's Condition 3 provides that "the
 6 insured shall immediately forward to the [insurer] every demand,
 7 notice, summons or other process" received. The Atalig claim was
 8 filed in March 2006 and OKP had knowledge of the lawsuit at least
 9 since early April 2006. OKP first provided notice to Dongbu of
 10 the claim approximately four months later, in early August 2006.
 11 That is not "immediate" notice. (§35, Dongbu First Amended
 12 Complaint)

13 42. General Condition No. 5 requires immediate notice of claims,
 14 and expressly bars any coverage under the CAR Policy where the
 15 insured does not provide notice to the insurer within 14 days of the
 16 insured being aware of the claim.⁵ (§42. First Amended
 17 Complaint)

18 Conspicuously absent from the allegations regarding delay in notice is any allegation that
 19 Dongbu has been prejudiced by any alleged delay.

20 The requirement that an insurer show it has been prejudiced by a lack or delay in notice
 21 as a basis to disclaim coverage is the rule in the majority of jurisdictions:

22 In the overwhelming majority of states, an insurer may not raise
 23 the failure of an insured to give notice as a valid defense to its
 24 obligation to provide coverage under an insurance policy, unless
 25 the insurer can demonstrate prejudice from the insured's failure to
 26 comply with the policy's notice provisions.

27 *Homes' Appelman on Insurance 2d.*, Vol, 22, §139.4(c).

28 Factors the courts consider in determining whether the insurer has been prejudiced by lack or
 delay in notice include: (1) the availability of witnesses, (2) the ability to discover other
 information, (3) the existence of official reports concerning the occurrence, (4) the preparation
 and preservation of demonstrative and illustrative evidence, and (5) the ability of experts to
 reconstruct the occurrence. *Id.*, §139.4(c)(l).

⁵ The 14 days requirement in the policy is unenforceable as 4 CMC §7505(c) says an insured shall have at least 20 days to give notice of loss and no requirement of notice for a lesser period is valid.

1 Case authority in accord with the requirement the insurer prove prejudice is found in the
2 following cases:

3 1. *Northshire Communications, Inc. d/b/a WEQX (FM) v. AIU Insurance Company*, 174 Vt.
4 295, 811 A.2d 216, 220, 222 (2002):

5 In 1997, this Court departed from nearly sixty years of precedent
6 and adopted a modern view of prompt-notice provisions in
7 insurance contracts by holding that an insured's failure to provide
8 prompt notice does not automatically defeat liability insurance
9 coverage. (citation omitted). While noting the value and
10 importance of prompt-notice provisions, we recognized that the
11 forfeiture of coverage for breach of these provisions is unfair to
12 insureds when that breach does not prejudice the insurer's position
13 relative to the coverage claim. (citation omitted). Pursuant to the
14 holding in *White Caps*, an insurer that seeks to be relieved of its
15 obligations under a liability policy because of a breach of the
16 prompt-notice provision must prove that the breach resulted in
17 substantial prejudice to its position in the underlying action.
18 (citation omitted) (emphasis supplied)

19 In this case Dongbu has not made any claim of prejudice from lack or delay in
20 notification, much less providing any evidence of prejudice. Further, even after being notified of
21 the claim Dongbu undertook no effort to investigate the matter. Under that circumstance
22 Dongbu is even precluded from asserting prejudice:

23 The insurer did not assert that it had made any investigative effort
24 to identify potential witnesses to the accident, that any particular
25 witness was unavailable or had suffered memory loss, that any
26 evidence had been lost or was unavailable, or that it had actually
27 made any significant investigation of the incident following the
28 notice of the claim. "An insured cannot assert prejudice with
regard to its ability to conduct an investigation that it never even
tried to conduct." *Id.*, 222.

2. *Brakeman v. Potomac, Ins. Co.*, 472 Pa. 166, 371 A.2d 193, 197 (1977).

In holding that an insurer that seeks to disclaim coverage on the basis of late notice must
show prejudice the *Brakeman* court said:

In short, the function of a notice requirement is to protect the
insurance company's interests from being prejudiced. Where the
insurance company's interests have not been harmed by late notice,

1 even in the absence of extenuating circumstances to excuse the
2 tardiness, the reason behind the notice condition in the policy is
3 lacking, and it follows neither logic nor fairness to relieve the
4 insurance company of its obligations under the policy in such a
5 situation.

6 Allowing an insurance company, which has collected full
7 premiums for coverage, to refuse compensation to an accident
8 victim or insured on the ground of late notice, where it has not
9 shown timely notice would have put the company in a more
10 favorable position is unduly severe and inequitable. Moreover, we
11 do not think such a result comports with the reasonable
12 expectations of those who purchase insurance policies. *Id.* 197-
13 198.

14 [W]e therefore hold that where an insurance company seeks to be
15 relieved of its obligations under a liability insurance policy on the
16 ground of late notice, the insurance company will be required to
17 prove that the notice provision was in fact breached and that the
18 breach resulted in prejudice to its position. *Id.*, 198

19 The majority view being that for an insurance company to refuse to provide coverage on
20 the basis of lack or delay in notification it must show prejudice, no claim of prejudice having
21 been made by Dongbu, the claims regarding lack of coverage on that basis must fail.

22 In reality, the lack/delay of notification claim is academic as Dongbu did receive notice
23 of the original complaint by knowledge on the part of its agent and then tendering of the defense
24 when the First Amended Complaint was filed.

25 E. **Undertaking Defense**

26 Dongbu disclaims coverage under the Auto Policy based on OKP undertaking defense of
27 the Atalig claim without Dongbu's permission.

28 Notwithstanding that Dongbu had knowledge of the Atalig suit, either through Moylan's
or by being provided copies of the First and Second Amended Complaints, despite demand
Dongbu undertook no steps to provide a defense to OKP. As Dongbu notes, the insurer will
defend any lawsuit and Dongbu didn't do that. Section II.(a) of the Insuring Agreements of the
Auto Policy states:

1 **II. Defense, Settlement, Supplementary Payments:** As respects
2 the insurance afforded by the other terms of this policy under
3 Coverage A and B the company shall:

4 (a) defend in his name and behalf any suit against
5 the insured alleging such injury or destruction and
6 seeking damages on account thereof, even if such
7 suit is groundless, false or fraudulent; but the
8 Company may make such investigation, negotiation
9 and settlement of any claim or suit as it deems
10 expedient.

11 Dongbu did not come forward to defend the suit; Dongbu didn't even offer to provide a defense
12 under a reservation of rights. For Dongbu to have knowledge of the suit, to have the defense
13 tendered, to do nothing and then seek to disclaim coverage on the basis that OKP undertook
14 defense of the suit without its permission is unconscionable. By its inaction Dongbu has
15 forfeited any defense based on OKP defending the suit without its permission. Further, Dongbu
16 has not been prejudiced by OKP's defense of the Atalig suit and Dongbu makes no allegation
17 that it was prejudiced.

18 As was noted in *Major Oil*:

19 "Courts are loathe to enforce forfeitures and indeed they should be,
20 except where an insurer has so conducted itself in the issuance of
21 the policy as to preclude it from asserting any ground upon which
22 it might be entitled to avoid the policy. There is no doubt but that
23 an insurer may waive provisions inserted in the contract for its
24 benefit, and may be estopped from asserting reasons ordinarily
25 justifying a forfeiture of the policy ... An insurance company may
26 be charged with knowledge of facts which it ought to have known
27 ... Knowledge which is sufficient to lead a prudent person to
28 inquire about the matter, when it could have been ascertained
 conveniently, constitutes notice of whatever the inquiry would
 have disclosed, and will be regarded as knowledge of the facts."
 (citation omitted.)

Major Oil at page 602.

 Perhaps Dongbu feels an appropriate course of action for OKP would be to have done
 nothing and simply allow a default judgment to be entered against it. This makes no sense.
 Dongbu had notice of the suit and did nothing to protect the interests of its insured, yet seeks to

disclaim coverage because OKP took steps to protect itself and its employees when Dongbu refused to fulfill its obligations under the policies.

F. **Events Occurring In Direct Connection With Construction On The Site**

At page 45 of the Complaint Dongbu makes the following allegation as basis for denial of coverage under the CAR Policy:

45. The third party liability coverage only applies to events "occurring in direct connection with the construction" that also occurs on the site. CAR coverage form, Third Party Liability section. The Atalig claim arises out of events that occurred in indirect connection with the construction project, and did not occur on the construction site.

A reading of the applicable provision from the Third Party Liability section regarding property damage provides actually that the policy covers:

b) accidental loss of or damage to property belonging to third parties

(sic) occurring in direct connection with the construction or erection of the items insured under Section. and happening on or in the immediate vicinity of the site during the Period of Cover.

When examining the language "occurring in direct connection with the construction or erection of the items insured under Section and happening on or in the immediate vicinity of the site during the Period of Cover", the "Section" provision/number is not included thereby rendering that provision ambiguous and unenforceable.

Regarding whether the events occurred on or in the immediate vicinity of the site, the Declaration Page recites: Site of Construction: **Rota, Commonwealth of the Northern Marianas.**

The claims arose from events on the site as "site" is described in the policy.

The CAR Policy does not define what constitutes "occurring in direct connection with the construction ..." The policy identifies the "Title of Construction" as **Rota Int'l Airport Project.** Common sense dictates that leasing the property which was to act as a staging area for the

project and clearing that area would constitute an event "occurring in direct connection with the construction." It is part of the overall construction project. The term being undefined, it should be interpreted as a reasonable person would understand the term and any ambiguity is resolved against Dongbu as the drafter of the policy.

G. **Exclusion IX(a) and V(a) Inapplicable**

1. **Exclusion IX(a)**

Exclusion IX(a) of the Auto Policy reads: This Policy Does Not Apply:

IX. Under Coverage B,

(a) to injury to or destruction of property owned by, rented to, in charge of or transported by the insured.

The comparable exclusion in the CAR Policy is in the **Third Party Liability, Special Exclusions to Section** which reads:

The insurers will not indemnify the Insured in respect of

4. liability consequent upon

b) loss of or damage to property belonging to or held in care, custody or control of the Contractor(s), the Principal(s) or any other firm connected with the project which or part of which is insured under Section, or an employee or workman of one of the aforesaid;

An examination of the Atalig Complaint, whether it be the original Complaint, the First Amended Complaint or the Second Amended Complaint alleges claims for damage to property which was not covered by the lease agreement between Atalig and OKP. Indeed the claims are that OKP committed acts of waste or conversion either without the specific written consent of Atalig or without obtaining the required permits before beginning clearing of the property where these acts are alleged to have occurred.

Clearly there is no claim by Atalig that OKP owned or transported property. Regarding whether OKP rented or was in charge of the property which is the subject of the damage claims, it is equally clear those property items were not rented to or that OKP was in charge of them,

1 because of the lease requirements that Atalig's written consent was required to:

2 ...erect, maintain, alter, remodel, reconstruct, rebuild, replace, and
3 remove building and other improvements on the Premise[s], and
4 correct and change the contour of the Premises ... (§38, Original
5 Complaint; ¶61, First Amended Complaint; ¶56, Second Amended
6 Complaint).

7 The Lease included in all three versions of the Complaints sets forth what OKP was
8 leasing, and it was not the Atalig real property. According to the Complaints and Lease OKP
9 leased:

10 1. Premises: The Premises consist of all *improvements* situated on
11 the real property ...together with the right to use Lessor's
12 easements and appurtenances in adjoining and adjacent land.
13 highways, roads, streets, lanes Lessee shall also have the *right*
14 *to use* the real property described below where the leased
15 improvements are situated: (italicized emphases added).

16 The lease provisions setting forth what portion of the property was being leased, the
17 improvements only, and requiring Atalig's prior written consent prior to OKP undertaking
18 certain actions and Atalig's related claims in the Complaints are inconsistent with Dongbu's
19 position that the allegedly damaged property, ancient Chamorro and Japanese artifacts, was
20 "rented to" or "in charge of" OKP.

21 In *State Farm Fire & Casualty Company v. Kohen*, 424 N.E.2d 992, 994, 995 (1981) the
22 court examined an exclusionary clause very similar to Exclusion IX(a) of the Auto Policy. The
23 clause in the *State Farm* case read:

24 THERE IS NO COVERAGE: For any damages

25 b. To property owned by rented to, in charge of, or transported by
26 an Insured. But coverage applies to a rented residence or private
27 garage damaged by a car use insure.

28 The Court interpreting this exclusion stated:

Typically, liability coverage includes damage to property owned
by someone other than the insured. The purpose of the clause in
issue is to exclude from liability coverage damage to property of
the insured.

1 The Court went to say:

2 [w]e find that the ordinary meaning of "in charge of" is possession
3 of the property and some degree of control of or dominion over it
4 so as to give the insured an ownership-like status and an insurable
interest in the property.

5 The Atalig lease requirements that OKP have his written consent is inconsistent with
6 OKP having an "ownership-like status" and therefore Exclusion IX(a) is inapplicable.

7 2. **Exclusion V(a) of the Auto Policy**

8
9 Exclusion V(a) of the Auto Policy reads:

10 This Policy Does Not Apply:

11 **V. Under Coverage A, B and C⁶**

12 (a) to liability assumed by the Insured under any contract or
13 agreement

14 This exclusion does not apply because the purpose of such provision is to exclude coverage
15 liability where the insured assumes the responsibility for the acts of a third party, usually in
16 situations under an indemnity or hold harmless agreement. That is not our case.

17 In *Olympic Inc vs. Providence Wash. Insur. Co. of Alaska*, 648 P.2d 1008, 1011 (1982) a
18 similarly worded exclusion was examined. The Court said:

19 "Liability assumed by the insured under any contract" refers to
20 liability incurred when one promises to indemnify or hold harmless
21 another, and does not refer to liability that results from breach of
contract. (citations omitted)

22 Because "liability assumed by contract" refers to a particular type
23 of contract - a hold harmless or indemnification agreement - and
24 not to a liability that results from breach of contract, the
contractual liability exclusion applies only to hold harmless
25 agreements (citation omitted) *Id*, 1011.

26 Citing with approval the *Olympic Inc.* case, the court in *James v. Burlington Northern Santa Fe*
27 *Railway Company*, 2007 WL 2461685 said:

28 ⁶ Coverage B is Property Damage Liability

1 Yet another exclusion provides, "[Coverage A] does not apply to
2 bodily injury or property damage for which the insured is obligated
3 to pay damages by reason of assumption of liability in a contract or
4 agreement." This contractual liability exclusion "functions to
5 relieve the insurer of responsibility for any 'extra' liability the
6 insured undertakes by contract beyond the liability imposed by law
7 for negligence." (citation omitted) The contractual liability
8 exclusion limits Coverage A to bodily injury or property damage
9 liability "which the law imposes upon all insured alike." (citation
10 omitted)

11 See also: *Federated Mutual Insurance Company v. Grapevine Excavations, Inc.*, 197 F.3d 720,
12 726 (2000) regarding interpretation of the contractual liability exclusion (This exclusion operates
13 to deny coverage when the insured assumes responsibility for the conduct of a third party.)

14 Clearly exclusion V(a) does not apply to defeat coverage.

15 **VIII. OKP'S CONDUCT NOT INTENTIONAL CONDUCT**

16 At paragraph 36 of the Complaint Dongbu alleges:

17 The intentional conduct alleged may further be outside the scope of
18 insurable risks pursuant to the Commonwealth Insurance Code and
19 public policy, which provides that willful acts and illegal conduct
20 are not insurable. 4 CMC §7505(b)

21 Dongbu makes the same allegation with reference to the CAR Policy at paragraph 44 of its
22 Complaint.

23 Initially it is noted that neither the Auto Policy or the CAR Policy contain any intentional
24 acts exclusion provision for property damage liability. Typically an intentional acts exclusion
25 would be worded to exclude from coverage "an event or series of events, including continuous or
26 repeated exposure to conditions, which results in personal injury or property damage neither
27 expected nor intended from the standpoint of the insured. There is no language in either of the
28 Dongbu policies similar to the foregoing. Whether or not the acts of OKP complained of were
intentional acts or not makes no difference. The standard for determining whether or not conduct
constitutes an intentional act is set forth in *Holmes' Appleman on Insurance 2d*, Vol. 20
§129.2(5) (page 119-120):

1 The criteria for deciding whether the insured intended or expected
2 to cause bodily injury is not merely whether an intentional act
3 occurred; but rather what consequences an objective, reasonable
person might expect or intend to result from the deliberate act.

4 The allegations of the Plaintiff's Complaint(s) do not allege intentional acts. Further,
5 notwithstanding the language of the Complaint(s), there is no intentional acts exclusion in the
6 policies.

7 Dongbu's reliance on 4 CMC §7505(b) to disclaim coverage in its entirety is misplaced.
8 The statute goes to the issue of indemnification if OKP's conduct is determined to be willful, it
9 does not go to duty to defend. As previously noted, duty to defend and duty to indemnify are
10 separate obligations and even if conduct were found to be willful in the context of 4 CMC
11 §7505(b), that does not relieve Dongbu of its duty to defend.

12 IX. **PUNITIVE DAMAGES**

13
14 OKP acknowledges that punitive damages are excluded under the CAR Policy. There is
15 no punitive damage exclusion in the Auto Policy.

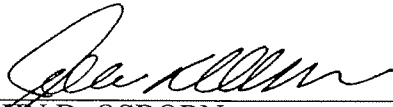
16 X. **CONCLUSION**

17 Based on the statements and authorities contained in the Memorandum of Points and
18 Authorities, OKP (CNMI) Corporation moves the Court for an order determining there are no
19 genuine issues of material fact regarding Dongbu's duty to defend the *Atalig v. OKP* lawsuit in
20 the CNMI Superior Court and finding as a matter of law that Dongbu Insurance Company, Ltd.
21 has a duty to defend OKP (CNMI) Corporation in Commonwealth Superior Court Civil Action
22 No. 06-0119R. Additionally, OKP requests that upon determination of the duty to defend that a
23 separate proceeding be held to determine the amount that Dongbu should be required to pay to
24 OKP for attorney fees and costs incurred by OKP as a consequence of Dongbu's failure to defend
25 the underlying *Atalig v. OKP* lawsuit.
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CARLSMITH BALL LLP

DATED: Saipan, MP, May 22, 2008.



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